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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 2

JEAN BOURDIEU,
Petitioner,

vs.

PACIFIC WESTERN OIL COMPANY (a corporation), KETTLEMAN OIL CORPORATION (a corporation), KETTLEMAN NORTH DOME ASSOCIATION (a corporation), FRANK KENNEDY and FRANKLIN R. KENNEY,
Respondents,

THOMAS M. CRUM and C. G. SMITH, et al.,
Defendants.

BRIEF FOR RESPONDENTS.*

STATEMENT OF THE CASE.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, to which court a writ of certiorari has been directed, is printed in the Record at pages 364-380, and is reported in 80 F. (2d) 774.

*The Court may disregard the Brief in Opposition to Petition for a Writ of Certiorari, heretofore filed, because this Brief is filed herein as a complete new Brief.

Because he presents the merits of the case in his Supplementary Brief (p. 28 et seq.), and because of various omissions in the statement of the case and the facts given by the petitioner in his petition and in his briefs, concerning matters considered important, respondents here set out a brief statement of the case.

By bill of complaint, filed in the District Court for the Southern District of California, Northern Division, July 1, 1931 (R. 5-18), the petitioner, claiming that Section 20 of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, U.S.C. title 30, Sections 181 et seq., entitles him to "a preference right" thereto, seeks to impress a trust in his favor upon a portion of an oil and gas lease (R. 302-317) which was issued as of October 4, 1929 (R. 302), under the Leasing Act of February 25, 1920, by the United States to the respondents Kettleman Oil Corporation, Ltd., and Pacific Western Oil Company, the portion involved here being so much of the lease as covers the North Half (N½) of Section 30, Township 21 South, Range 17 East, Mt. Diablo Meridian, in California, which contains 322.89 acres (R. 5-18) situated in the North Dome of the Kettleman Hills. The facts out of which petitioner's asserted "preference right" is claimed to arise are as follows:

Prior to 1910 the land in Section 30 was classified as agricultural land, and was open to entry under the general land laws. (R. 267; Bulletin 623, in evidence, pp. 102-108.)

The Pickett Act, 36 Stat. 847, U.S.C. A. title 43, Sections 141, 142, 143, was passed by Congress on

June 25, 1910. The text of this Act is set out in its entirety in the Appendix to this brief at pages 1 and 2. The first section is pertinent here. It provides that

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

December 28, 1910, the Acting Director of the Geological Survey wrote the Secretary of the Interior that "Information received from the field indicates that the following lands (describing all of Section 30 in Township 21 South, Range 17 East, M. D. M., and other lands) are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action:". (R. 286.) Under date of December 29, 1910, the Director's letter of December 28, 1910, was by the Acting Secretary of the Interior "referred to the President with favorable recommendation". (R. 286.)

December 30, 1910, President Taft signed an order withdrawing the lands, including all of Section 30, Township 21 South, Range 17 East, described in the form of order which had been submitted to the Secretary of the Interior on December 28th by the Acting Director of the Geological Survey and which had been referred to the President with the favorable

recommendation of the Acting Secretary of the Interior. (R. 286-289.) The Order of Withdrawal so signed by the President will be found in the Record at pages 286-289. The order, the action of the Acting Director of the Survey and the action of the Acting Secretary are set forth in full in the Appendix at pages 3-6. The order is entitled "Order of Withdrawal—Petroleum Reserve No. 16—California No. 7" and, so far as pertinent here, reads as follows:

> "It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled 'An Act to Authorize the President of the United States to Make Withdrawals of Public Lands in Certain Cases', approved June 25, 1910:
>
> * * * Mt. Diablo Meridian, California,
> T. 21, S. R. 17 E. * * *
> Section 30, all; * * *
>
> The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,981 acres.
>
> Wm. H. Taft, President.
>
> December 31, 1910.
>
> Referred to the Commissioner of the General Land Office for appropriate action.
>
> R. A. Ballinger, Secretary."

To the regular session of Congress (House Document No. 317, 62d Congress, 2d Session; R. 234-239)

following the date of the withdrawal order of December 30, 1910, the Secretary of the Interior, pursuant to the requirements of Section 3 of the Pickett Act, made a report of lands withdrawn from settlement under the Pickett Act in which he listed under the heading "Petroleum" the lands described in the withdrawal order of December 30, 1910.

July 17, 1914, Congress passed "An Act to Provide for Agricultural Entry of Lands Withdrawn, Classified, or Reported as Containing Phosphate, Nitrate, Potash, Oil, Gas or Asphaltic Minerals". 38 Stat. 509, U.S.C.A. title 30, Sections 121, 122, 123. (Appendix pp. 6-9.) Stated in brief substance, section 1 qualifies for appropriation under the non-mineral land laws "lands withdrawn or classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals, or which are valuable for those deposits" if entry thereon be made "with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable". Section 2 provides for the issuance of a patent containing "a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable", and preserves unabridged the right to present applications to enter such lands "with a view of disproving such classification and securing a patent without reservation", and also the right to show before final entry that the lands "are in fact non-mineral in character". Section 3 provides that one who has in good faith entered or who shall enter,

under the non-mineral land laws, lands "which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals", may upon applying therefor and making proof under the applicable laws, receive a patent therefor with "a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, * * *."

March 6, 1919, the Petitioner herein filed in the United States Land Office at Visalia, California, a homestead entry in which he applied to enter under the Act of February 19, 1909 (35 Stat. 639) (For text of this Act see Appendix pp. 9-14), Lots 1, 2, East Half (E½) Northwest Quarter (NW¼); Northeast Quarter (NE¼) Section 30, Township 21 South, Range 17 East, Mt. Diablo Meridian, containing 322.89 acres. The application was stamped as follows: "Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 598)." (R. 291-296.) Immediately above the signature of the entryman on the application (R. 294) appear the words "Subject to provisions and reservations and limitations of Act of July 17, 1914". Admittedly this application was read "very carefully" by the petitioner, and he remembered "that it was made 'subject to provisions and reservations and limitations of the Act of July 17, 1914' ". (R. 94, 95.)

February 25, 1920, Congress passed the Leasing Act of that date. Section 20 of that Act reads as follows:[1]

> "In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres, for the purpose of making joint application. Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty and not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under section 14 hereof."

May 28, 1921, the Secretary of the Interior, acting under the Leasing Act of February 25, 1920, 41 Stat. 437, issued to one Thomas M. Crum United States Oil and Gas Prospecting Permit Visalia No. 09551, now Sacramento No. 019438, covering 2556.58 acres, including all of Section 30, in Township 21 South, Range 17 East. (R. 216-219; 297.) At the time he made application for this permit Crum did

(1)Section 20 is one of the so-called relief sections of the Leasing Act of February 25, 1920. Its purpose and operation are explained in an appendix to the Regulations promulgated by the Secretary of the Interior under the Leasing Act, and published in General Land Office Circular 672 in October,

not serve personal notice thereof on petitioner, nor did he furnish evidence of the service of notice or evidence that petitioner was the owner of any of the land involved in the application. (R. 109.)

From the summer of 1919, when he built a house, facing east, about two hundred yards south of the north section line of Section 30, down to July 1, 1931, when he filed the instant suit, the petitioner lived on the North Half of that section. As early as 1925 he was admittedly told that he had a preference right to drill for oil under the North Half of Section 30. As early as 1928 he was admittedly told by a Mr. Kennedy that Crum had a prospecting permit, covering Section 30 and other lands, to drill for oil therein. During that time he admittedly knew that oil wells were being drilled on Sections 20 and 28, within the area of the Crum permit, and on Sections 29 and 34, Township 21 South, Range 17 East, near the Crum permit area, but by his own admissions he "was not interested in the minerals" under his land, and made no claim to any right therein. (R. 91, 96, 99-102.)[2]

1920. The pertinent portion of that explanation is printed in the appendix at pages 42-47. And see regulation 12 issued by Department of the Interior stating that in order to qualify for a preference right to a permit, "the *entry* must have been made without a reservation of the oil and gas", * * *. (Appendix pp. 14-18.)

(2)In this connection it is to be noted that the District Court decreed that petitioner "has been and is guilty of gross laches in the assertion of his claim". (R. 330.) In his memorandum of decision (R. 259-260), which is incorporated in the findings (R. 282), the District Judge said:

> "Inasmuch as it has been found that complainant is not entitled to any preferential right under the Leasing Act I deem any finding on the issue of laches to be unnecessary. Nevertheless it is considered proper to observe that the admitted delay of about three years by Mr. Bourdieu after his knowledge of the existence of the defendants' oil lease covering his homestead, speaks forcefully against him in a court of equity. According to the evidence he idly sat by and through silent acquiescence encouraged the defendants to develop their lease and prove his homestead to contain oil in valuable quantities and then at a late date after speculating upon defendants' expensive explorations

June 8, 1925, the Register of the Land Office at Visalia, California, delivered to the petitioner herein a Register's Final Certificate (R. 297-299) (Appendix pp. 25 and 26), upon the face of which there was stamped the following: "Patent to contain provisions, reservations, conditions and limitations of the Act of July 17, 1914 (38 Stat. 509), as to oil and gas." (R. 299.) On October 7, 1925, a patent to the lands described in the petitioner's homestead entry, that is to say, the land, involved in this litigation, was issued to the petitioner herein. (R. 299-301.) In addition to the usual provisions this patent contained the following: "Also excepting and reserving to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509)." (R. 300, 301.)

March 8, 1929, by divers mesne conveyances the oil and gas prospecting permit which had been issued to the said Thomas M. Crum in 1921, and the rights and privileges of the original permittee therein and thereunder, became vested in the Respondents Kettleman Oil Corporation, Ltd.[3] and Pacific Western Oil Company, in the proportion of an undivided one-half

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and activities, asks that the fruits of their labor and expenditures be transferred to him. His claim is stale and inequitable.

The case involves oil lands. Property rights in such areas should be asserted with celerity. A suitor cannot be allowed to remain passive, eager to appropriate the benefits of another's activity if success is achieved or to assume an attitude of laissez faire if the other efforts result in failure. * * *"

(3)Kettleman Oil Corporation, Ltd. was formerly Kettleman Oil Corporation and was sued herein by that name. In this brief no attempt has been made to use one name throughout.

interest thereof to each of the said named corporations. (R. 301, 302.) Thereafter the Secretary of the Interior, having determined that discovery had been made of oil and gas in the land covered by the said permit, on October 4, 1929, executed and issued to the Kettleman Oil Corporation, Ltd., and the Pacific Western Oil Company, under the provisions of the said Leasing Act of February 25, 1920, a lease of oil and gas lands, which lease included and now includes the lands in said Section 30, Township 21 South, Range 17 East, Mt. Diablo Meridian. The lease is set out in full in the Record at pages 302-317.

Although he entered the North Half of Section 30, Township 21 South, Range 17 East, under the Enlarged Homestead Act of February 19, 1909, after that section was withdrawn by the Presidential Order of Withdrawal of December 30, 1910, and during the period when that Order of Withdrawal was in full force, except for the permissive effect of the above mentioned Act of July 17, 1914, the petitioner herein complains that the Circuit Court of Appeals for the Ninth Circuit erroneously refused to decide whether or not he had the preference right claimed by him under Section 20 of the Leasing Act of February 25, 1920, and claims that Section 20 of the Leasing Act gave him a preference right to a prospecting permit on the above described lands and to a lease in case of discovery, in consequence of which the respondents herein are his trustees to the extent of so much of their oil and gas lease as covers the North Half of said Section 30.

SUMMARY OF ARGUMENT.

Point One: The decision of the Circuit Court of Appeals should be affirmed because the United States is an indispensably necessary party to the suit.

Point Two: Petitioner never had a preference right because the lands in question were withdrawn and classified as mineral at the time of entry.

1. (a) The withdrawal order of December 30, 1910, shows on its face that it withdrew the lands as mineral, that is to say as petroleum lands.

(b) The history of the times demonstrates that the withdrawal order had as its object the withdrawal as mineral of the lands in suit.

(c) The Executive Department, through the Secretary of the Interior, interpreted the withdrawal as a mineral, that is to say petroleum, withdrawal.

(d) The Geological Survey characterized the withdrawal as a petroleum withdrawal.

2. The lands involved in this suit having been withdrawn lands at the time of petitioner's entry, if they were not withdrawn as petroleum lands petitioner had no right to enter them under the non-mineral land laws. If they were withdrawn as petroleum lands he has no preference right under Section 20 of the Leasing Act.

3. The lands in suit here were not only withdrawn as mineral lands; they were classified as mineral, that is to say as petroleum lands, at the time of petitioner's entry.

4. In Section 20 of the Leasing Act Congress must have referred to the type of withdrawals of which the withdrawal involved here is an example, because the form of withdrawal here is the form of oil land withdrawal used by the Executive Department after the enactment of the Pickett Act.

Point Three: The amended bill of complaint fails to state a cause of action because it does not show that the petitioner was himself entitled to either a permit or a lease from the United States and that it was refused to him because of an erroneous ruling by the Secretary of the Interior.

Point Four: The petitioner has been guilty of laches in the assertion of his claim.

POINT ONE.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT DISMISSING THE SUIT SHOULD BE SUSTAINED.

Reversal by this court of the decision of the Circuit Court of Appeals will permit either that court or this court to consider and decide the merits of the case without the presence of the United States as a party. If this court should reverse the decision, it is earnestly hoped that the case will be retained here and its merits considered and determined.

The Circuit Court of Appeals decided that the suit and complaint must be dismissed, saying:

> "The United States was not made a party to this suit, and it is conceded that the United States

is the owner of the oil and gas deposits. It is shown that two of the appellees are lessees of the government, and by reason thereof have a permissive right to remove the oil and gas deposits. It is apparent therefore that neither the court below nor this court has jurisdiction of the subject matter of the suit, and therefore the motion to dismiss made by appellees in the court below should have been sustained."

The motion to dismiss (R. 357, 358) filed in the trial court by respondents Pacific Western Oil Company and Kettleman Oil Corporation, urged, as its second ground, that,

"There is a defect of parties to the said suit in that the United States of America is not either a party plaintiff or a party defendant although the bill of complaint shows on its face that the United States of America is an indispensable party to a complete determination of the suit and action."

In support of its decision the Circuit Court cited (R. 378, 379):

Bockfinger v. Foster, 190 U. S. 116, 126;
Wilcox v. Jackson, 13 Pet. 498;
United States v. Schurz, 102 U. S. 402;
Wilson v. Elk Coal Co., 7 F. (2d) 112, 113 (cert. den. 269 U. S. 587);
Proctor v. Painter, 15 F. (2d) 974.

It is the position of the respondents here that even if the Circuit Court of Appeals and the trial court had jurisdiction of the subject matter of this litigation, the decision of the Circuit Court of Appeals should be sus-

tained because the United States is an indispensably necessary party, and a decree to the effect that petitioner is entitled to a portion of the lease which was issued by the Secretary of the Interior to the respondents Kettleman Oil Corporation and Pacific Western Oil Company would directly interfere with the discretion already exercised by the Secretary of the Interior under the Leasing Act of February 25, 1920.

This court has decided that indispensable parties are those who have such an interest in the subject matter of the controversy that a final decree cannot be made without affecting those interests.

Shields v. Barrow, 17 How. 130, 139 (1854);
Christian v. Atlantic & N. C. R. R., 133 U. S. 233, 241 (1890);
Niles-Bement-Pond Co. v. Iron Molder's Union, 254 U. S. 77, 80 (1920);
Commonwealth Trust Co. v. Smith, 266 U. S. 152, 159 (1924).

It is conceded that the United States is the owner of the oil and gas underlying the lands in suit here, that respondents Kettleman Oil Corporation and Pacific Western Oil Co. are the lessees of the United States, and that by reason thereof they have a permissive right to remove the oil and gas. Thus lessees' claim under and their rights depend upon the right of the United States as lessor. The interest of the United States further appears from the fact that Congress has invested the Secretary of the Interior with discretion respecting the disposal of the oil and gas in question. Petitioner erroneously assumes in his brief that

Section 20 of the Leasing Act confers a preference right which in no way involves the exercise of the Secretary's discretion. (Petitioner's Supplemental Brief, p. 20.) The basis for this is the language "shall be entitled to a preference right to a permit" found in Section 20. It may be conceded that those words imposed upon the Secretary the absolute duty to award a privilege of first refusal to entrymen who are entitled to the benefits of Section 20.

The preference right granted by Section 20 of the Leasing Act is not, however, an absolute right in the sense claimed by petitioner. The Secretary must, in the first instance determine whether he should open the public domain, or any particular part of it, to prospecting at all. He may, in his discretion, grant or deny in part or in whole any application for a permit, as the facts may be deemed to warrant. It has been determined by this court that such was his discretion at the time the permit and lease in question here were issued.

> *United States v. Wilbur*, 283 U. S. 414, 419 (1931).

In the *Wilbur* case, supra, it appears that the Secretary of the Interior had issued a general order either rejecting or refusing to receive applications to prospect for oil or gas on the public domain. He claimed this "was done in pursuance of the authority vested in him by law". The court said that,

> "Having examined the Act (the Leasing Act of 1920) we cannot say that by any clear and indisputable language it refutes his position. Certainly

there is ground for a plausible, if not conclusive, argument that so far as it relates to the leasing of oil land it goes no farther than to empower the Secretary to execute leases which, exercising a reasonable discretion, he may think would promote the public welfare." (p. 419.)

From this decision it would seem to follow that in 1929, when the lease involved in the instant suit was issued to the respondents Kettleman Oil Corporation and Pacific Western Oil Company, the Secretary of the Interior had the power, "exercising a reasonable discretion", to refuse to grant oil and gas leases upon any unit of the public lands if he thought such refusal "would promote the public welfare". The petitioner herein, according to his claim, had a preference right to a lease covering the North Half of Section 30, containing 322.89 acres, and no more. He makes no contention that he was entitled to a lease covering any larger area. The area actually leased to the respondents in 1929 contained 562.89 acres. (R. 303.) Upon the analogy of the *Wilbur* case, supra, the Secretary had the power, "exercising a reasonable discretion", to decide whether or not it would promote the public welfare to include 562.89 acres in one lease or only 322.89 acres. Within the authority of that case, if petitioner had applied for a lease covering 322.89 acres, and no more, the Secretary was empowered to refuse to grant the application. If anyone else had applied for a lease covering these lands, or these and other lands, the Secretary could have refused. It may be conceded, arguendo, that if the Secretary decided to

lease the land to anyone at all in that unit of 322.89 acres, the petitioner, by virtue of his claimed preference right, was entitled to the first refusal of a lease or leases covering that area.

The real importance to the Secretary of the Interior of the power to determine in what units the oil resources in the public domain should be developed, is, we believe, demonstrated by the power expressly granted to the Secretary, in Section 30 of the Leasing Act, to permit a lessee to relinquish rights under a lease and to surrender any legal subdivision of the area within the lease. The portion of Section 30 which expressly gives the Secretary this discretion reads as follows:

> "The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all further obligation under said lease, and may with written consent surrender any legal subdivision of the area included within the lease."

How has the Secretary exercised his discretionary power upon the question of whether or not he would have leased 322.89 acres of this land to petitioner, had petitioner applied therefor? There is no evidence upon which this question can be answered. The only evidence is that the Secretary actually exercised his discretion by leasing a parcel containing 562.89 acres. It is submitted that a court should not now say, without hearing from the Secretary of the Interior, what the

Secretary would have done in 1929 if the petitioner had applied to him. A decree of a court entered in the absence of the Secretary, would decide what the Secretary would have done had an application been presented to him by petitioner.

Section 30 of the Leasing Act of February 25, 1920, provides, in part,

> "That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior."

This language clearly reserves in the Secretary power to say, in the exercise of a reasonable discretion, when, under what circumstances, and to whom a lease issued under the authority of the Act may be assigned. If a court should decide, in the absence of the Secretary, that the lessees in this suit hold their lease as trustees for the petitioner, the decision can go no farther than the interest and claim asserted, which is a right to a lease covering 322.89 acres—not 562.89 acres. What will be the effect upon the interests of the United States, the owner of the oil and gas, of a decree commanding the assignment of only so much of the lease as covers the 322.89 acres embraced within the petitioner's patented homestead? It is submitted that that question cannot be answered unless the Secretary of the Interior is made a party to the litigation. Surely if the court can make in this case, in the absence of the Secretary of the Interior, a decree assigning to the petitioner some portion of or all the leasehold interest involved herein, the discretionary power of the Secretary to say whether or not a lease

issued under the Leasing Act of 1920 shall be assigned; is taken away from the Secretary although it is expressly vested in him by Section 30 of the Leasing Act. Moreover, such a decree would in effect decide how the Secretary had exercised this discretionary power before he has been afforded an opportunity to say what he would do under "his general powers over the public lands as guardian of the people", and under the express authority with which he is invested by the Leasing Act.

The cases which petitioner cites as being in conflict with the decision in the case at bar are readily distinguishable from this case.

Witbeck v. Hardeman, 51 F. (2d) 450 (affirmed 286 U. S. 444), is not authority to the point that in the case at bar the Secretary of the Interior, is not a necessary party. There the Secretary had fully exercised his discretionary power to place under a permit the particular unit in controversy and, in addition, he had made a decision between two applicants for a prospecting permit. The Circuit Court of Appeals for the Fifth Circuit seems to have recognized this when it stated (51 F. (2d) p. 453), "No other or different disposition is now proposed to be made, and no term of the contract is to be altered. A change of permittees is alone to be effected." In the case at bar it is proposed, at the very least, to alter a term of the contract by impressing a trust upon only a portion of the lease which the Secretary of the Interior granted to Kettleman Oil Corporation and Pacific Western Oil Company, and this without any indication or suggestion of

what the Secretary himself would have done in that regard if he had been called upon to act by both parties, as he was in the *Witbeck* case.

Skeen v. Lynch, 48 F. (2d) 1044, is not contrary to the position of the respondents here. The bill of complaint in that case contained two counts, the first seeking to quiet title to coal lands against a lessee thereof from the United States, and the second, seeking, in the alternative, to impress a trust upon the lease. The first count was dismissed on the ground that the United States was an indispensable party. This seems to have been obviously correct because the coal was owned by the Government and the plaintiff in the suit was seeking to quiet title to it without making the Government a party. The second count was decided against the plaintiff on the merits, the court holding that inasmuch as the plaintiff had entered the lands four years after the Leasing Act of 1920 was enacted, he could not possibly have had a preference right under Section 20 of that Act. This also was obviously correct because an entryman could not have a preference right under Section 20 unless he made his entry before the effective date of the Act which gave him the right. The point concerning necessary parties was not considered by the court in connection with the second count. Moreover, the case is distinguishable on the same grounds as the *Witbeck* case: the plaintiff in the *Skeen* case did not seek in his second count to alter any term of the contract.

Waterman v. The Canal-Louisiana Bank & Trust Company, Executor, 215 U. S. 33, is not in point on

any phase of the case at bar. The point of the case may be seen in a quotation taken from page 49 of the report, as follows:

> "If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne v. Hook,* 7 Wall. 425."

Alaska Consolidated Oil Fields v. Rains, 54 F. (2d) 868, from the Circuit Court of Appeals for the Ninth Circuit, is also distinguishable from the case at bar. In that case suit was brought to foreclose mechanics' liens for work done by the plaintiff in connection with the drilling of oil wells upon lands over which the defendant held a permit from the United States to prospect for oil and gas. It was held that the action would lie because the permit was an "interest in land" subject to mechanics' liens as prescribed by the laws of the Territory of Alaska. All the decree purported to do was to place the plaintiff, who was seeking to foreclose his lien, in a position to ask the Secretary of the Interior that he be made the permittee. The case did not in any way involve the question of what discretion the Secretary of the Interior had exercised in connection with the permit, whereas the case at bar involves that very question and, as well, the question of what discretion the Secretary of the Interior exercised in connection with the lease in suit here. Further, in the *Alaska* case, claims of the plaintiff were not

based in any way upon any rights derived or even claimed to have been derived from the United States, whereas in the case at bar the only right claimed by the plaintiff is a right which must arise under the land laws of the United States and from their administration by the Secretary of the Interior.

POINT TWO.

PETITIONER HEREIN NEVER HAD A PREFERENCE RIGHT TO A PERMIT OR TO A LEASE BECAUSE THE LANDS IN QUESTION WERE BOTH WITHDRAWN AND CLASSIFIED AS MINERAL, AT THE TIME OF PETITIONER'S ENTRY.

The term "mineral" as it is used in the Act of Congress relating to the public lands includes petroleum or mineral oil. (*Burke v. S. P. R. R. Co.*, 234 U. S. 669, 677-679.) The preference right claimed by petitioner could not have existed if the lands involved were, at the time of entry, "withdrawn or classified as mineral". Section 20 of the Leasing Act so states. (Supra p. 7.)

1. That the order of December 30, 1910 withdrew and classified the lands in suit as mineral, that is to say as petroleum lands, is demonstrated by the following considerations:

(a) It is clear from the face of the order (Appendix pp. 4-6) that it withdrew the lands as petroleum lands. It is entitled "Order of Withdrawal. Petroleum Reserve No. 16—California No. 7", thereby stamping the lands as petroleum lands. (*Cleveland Johnson,* on rehearing, 48 L. D. 18, 27; *Washburn v. Lane,* 258 Fed. 524, 525.) It expressly reserves them

"in aid of legislation affecting the use and disposal of *petroleum* lands belonging to the United States"; and it declares that "The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,986 acres". Thus it characterizes itself as one of a series of "petroleum withdrawals".

(b) The history of the times (*United States v. Union Pacific R. Co.*, 91 U. S. 72), prior to and at the date of the Order of December 30, 1910, discloses the reason for the promulgation of this and other similar orders of withdrawal. February 24, 1908, the Director of the United States Geological Survey wrote to the Secretary of the Interior urging that the filing of oil claims in California should be immediately suspended in order to insure an adequate supply of fuel oil for the Navy, and stated, in part, that "there are only a few areas of probable oil territory now remaining under governmental control, and these are rapidly being filed on and patented, either through legitimate oil development or by subterfuge over claims for gypsum, etc. If anything is to be done regarding the matter, there is no question but that it should be done at once, for prospecting is now going on at an unprecedented rate throughout the West". (Appendix pp. 37-39.) The Director renewed this recommendation on September 17, 1909 by transmitting to the incumbent Secretary of the Interior a copy of the above mentioned letter of February 24, 1908, and by writing that in the Geological Survey's Conservation report "it is shown that the present production of petroleum exceeds the legitimate demands of the trade and that inasmuch as the disposal of the public petroleum lands

at nominal prices simply encourages overproduction, the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource". (Appendix pp. 39-41.) The recommendation of the Director was approved by the Secretary of the Interior, who brought the matter to the attention of President Taft. September 27, 1909, the President issued "Temporary Petroleum Withdrawal No. 5", temporarily withdrawing all public lands within an area aggregating 3,041,000 acres in California and Wyoming, "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain". (R. 183, 184), (Appendix pp. 41 and 42.) *United States v. Midwest Oil Company,* 236 U. S. 459, 467.) The Pickett Act of June 25, 1910, 36 Stat. 847, was then enacted to set at rest any doubt about the power of the Chief Executive to make withdrawals of public lands in a proper case. (Appendix pp. 1 and 2.) Finally, the "proposed legislation" in aid of which the President had made the withdrawals of September 27, 1910, December 30, 1910 and other petroleum withdrawals, was enacted by Congress. That legislation is the Leasing Act of February 25, 1920, 41 Stat. 437.

Against the background of this history, it can hardly be successfully contended that the Withdrawal of December 30, 1910, did not have as its object the withdrawal "as mineral" of the lands involved in this suit, nor that it did not in fact place them, as petroleum lands, within the out boundaries of "Petroleum Reserve No. 16—California No. 7".

(c) December 8, 1911, the Secretary of the Interior characterized the withdrawal of December 30, 1910 as a petroleum withdrawal by placing it under the heading of "Petroleum", in a report made by him to Congress in compliance with the requirements of the 3rd section of the Pickett Act. (R. 234-239.)

(d) On a map forming a part of United States Geological Survey Bulletin 623, and purporting to represent all California oil lands included in outstanding withdrawals as of September 30, 1916, the Geological Survey includes the lands involved in this suit in that category. (R. II, 7; and back of Appendix.)

2. The lands involved in this suit having been withdrawn lands at the time of petitioner's entry, if they were not withdrawn as petroleum lands petitioner had no right to enter them under the non-mineral land laws. If they were withdrawn as petroleum lands he has no preference right under Section 20 of the Leasing Act. A withdrawal of public lands for any public purpose severs them from the public domain and keeps them severed until the order is revoked by the President or by act of Congress. Section 1 of the Pickett Act so states in effect (Appendix pp. 1 and 2); and the courts have so held.

Kansas Pac. Ry. Co. v. A. T. & S. F. R. Co., 13 Fed. 106, 107;

Wilcox v. Jackson, 13 Pet. 498, 513;

United States v. Midwest Oil Company, 236 U. S. 459.

It is indisputable that the lands here in suit were withdrawn for some public purpose, whether as mineral or for classification is immaterial for the moment.

No entry under the non-mineral land laws, no location under the mineral land laws, could be validly made upon them, and no interest in them could be acquired under any land laws of the United States so long as they remained withdrawn. How did it happen then, and by virtue of what authority, that petitioner made agricultural entry on the north half of Section 30 at a time when the lands were actually and indisputably withdrawn? The answer to this question appears in the Act of July 17, 1914, 38 Stat. 509 (Appendix pp. 6-9), which was enacted in recognition of the fact that although known to be valuable for minerals or actually classified by the Geological Survey as being valuable for minerals, including petroleum, lands were not invariably valueless for agricultural purposes: both mineral and agricultural values could co-exist.

In express terms the Order of Withdrawal prohibited "settlement, location, sale or entry" of the lands, whether the effect of the order was to withdraw them as mineral or merely for classification. When petitioner sought to make his homestead entry he was faced with the necessity of finding some method of avoiding the absolute prohibition against entry which is contained in the withdrawal order that segregated Section 30 from the public domain. His entry papers (Appendix pp. 19-24) prove that he relied upon and made his non-mineral entry "in accordance with and subject to the provisions and reservations of" the Act of July 17, 1914. But the first section of that Act, which is the section applicable in this case, qualified for non-mineral entry only three classes of land, viz.: (1) lands withdrawn as "* * * oil * * *" lands, (2) lands "classified as * * * oil * * *" lands, and

(3) lands which are "valuable for those deposits", and then only if the lands so qualified for non-mineral entry were "otherwise available" for entry. If the Withdrawal Order of December 30, 1910 was not a withdrawal as mineral, it was a withdrawal of some other kind, inasmuch as it is admitted that it was a withdrawal. The Act of July 17, 1914, purports only to affect a withdrawal order if that order is a withdrawal "as phosphate, nitrate, potash, oil, gas or asphaltic minerals". Stated in another aspect, by the first section of that Act Congress removed from the Order of Withdrawal of December 30, 1910 the prohibition against entry *if* that withdrawal was a withdrawal of the lands as oil lands, and permitted a limited type of non-mineral entry if the lands were "otherwise available". The Act of July 17, 1914, can be given no other meaning or effect in the circumstances of this case.

Although he made his agricultural entry solely by permission of the first section of the Act of July 17, 1914, and although that permission was granted by Congress only if the withdrawn lands were withdrawn as oil lands, and although Section 20 of the Leasing Act does *not* give a preference right if the lands were "withdrawn or classified as mineral", the petitioner is contending that said Section 20 gives him a preference right to a permit and to a lease in case of discovery. The petitioner is attempting to repudiate the foundation upon which his entry and title rest. His claim destroys itself.

See *Empire Gas & Fuel Co. et al. v. State* (Tex.), 21 S. W. (2d) 376, especially page 378.

In his presentation of this phase of his case, petitioner confuses the provisions of Section 1 of the Act of July 17, 1914, with the provisions of Section 3 of that Act, by failing to recognize that the first section relates to and qualifies for non-mineral entry lands which were withdrawn or classified as oil lands, or were valuable for those deposits, at the time of entry, and that the third section relates only to lands which are "withdrawn, classified, or reported as being valuable for * * * oil, * * *", *"subsequently"* to non-mineral entry thereon. These sections of the Act of July 17, 1914 are clear and unambiguous and no further comment upon them is deemed necessary. It is to be noted, however, that petitioner's confusion of the provisions of the first with the provisions of the third section is shown by his reference to and comment upon Exhibits Nos. 6-14 and Nos. 15-27 (R. 137, 142-158), at pages 58 and 59 of his Supplementary Brief. We have inserted a discussion of these exhibits in the (Appendix, pages 28-36). Suffice it to say here that petitioner's Exhibit No. 6 presents an instance of an entrywoman who entered lands bona fide as agricultural, which were withdrawn or classified as mineral *after* the date of entry and before the date when she completed her final proof, and that plaintiff's Exhibit No. 15 presents an instance of an entryman who entered upon lands bona fide as agricultural which were *subsequently* reported as being valuable for oil and gas. Petitioner's Exhibits Nos. 6-14 and 15-27 (Nos. 6 and 15 being stipulated in the record to be typical) are all governed and controlled by the provisions of Section 3 of the Act of July 17, 1914 and not by Section 1 of that Act.

3. The lands in suit here were not only withdrawn as mineral lands; they were classified "as mineral", that is to say as petroleum lands, at the time of petitioner's entry.

(a) In *West v. Rutledge Timber Co.*, 244 U. S. 90 at page 98, this court said: "Classification is characterization through the selection of some quality or feature, and therefore lands may be classified as pasturage, grazing, timber, arable or mineral"; and held that the report of a deputy surveyor that "* * * the lands, if cleared, would be suitable for grazing, but at the time of the report were more valuable for their timber * * *", was a sufficient classification of the lands as non-mineral. This indicates that this court does not attribute any magic to classification nor to be of the opinion that classification of the public lands is something that must be accomplished in accordance with some or any imagined statutory rule or even by any official or employee of the government. The purely temporary character of practically any classification of lands and especially of oil lands, is expressly recognized by Dr. George Otis Smith, Director of the Geological Survey, in a letter of June 17, 1908 (R. 161, 162), in which he said (R. 162): "In dealing with oil lands it must be borne in mind, however, that absolute determination, by work on the surface of the occurrence or non-occurrence of oil in any locality is not possible. The best that can be done is to calculate the degree of probability on the basis of surface indications and structural conditions." It would seem that a classification of lands, especially of petroleum lands, even

when made by the Geological Survey, is usually the result of inference drawn from purely surface indications and is, in the average instance, a mere expression of opinion or possibility.

The Order of Withdrawal of December 30, 1910, shows on its face that the Director of the Geological Survey said that "Information received from the field indicates the following lands are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action". The recommendation was approved by the Acting Secretary of the Interior and the order was thereupon signed by President Taft. It is submitted, upon the analogy of *West v. Rutledge Timber Co. et al.*, supra, that the lands in suit here were classified as petroleum by the written statement of the Acting Director of the Geological Survey, by the approval of the Acting Secretary of the Interior, and by the President in signing the order of withdrawal.

(b) Moreover, the lands in suit here were, in fact, classified as petroleum lands on December 27, 1910, at a meeting of the Oil Section of the Land Classification Board of the United States Geological Survey. (R. 197, 208.) Dr. Max Ball, who was Director of the Oil Section of that Board testified in this suit, and his testimony is undisputed, that the lands embraced within the Order of December 30, 1910, were actually classified as petroleum lands as a result of an examination and consideration of new evidence which had been brought in to the Board from the field by Mr. Anderson, a member of that Board. This testimony was given after proof had been made that the

records of the December 27, 1910 meeting of the Board had disappeared and could not be found. (R. 193-196.) He further testified that he himself had drafted the minutes of the meeting and a letter for the signature of the Acting Director of the Survey, transforming the action of the Oil Section of the Land Classification Board into a report to the Secretary of the Interior, accompanied by a form of Order of Withdrawal creating Petroleum Reserve No. 16—California No. 7. (R. 339.)

4. If the withdrawal of December 30, 1910 did not withdraw Section 30 "as mineral", no order of withdrawal issued after June 25, 1910, when the Pickett Act was passed, could have had the effect of withdrawing oil lands because all such orders of withdrawal were in the same, or practically the same, form as the order of December 30, 1910. They read that there is "hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, * * *", or contained language practically identical with the language just quoted.[4] It is to be assumed, therefore, that when it enacted Section 20 of the Leasing Act in 1920, and created a preference right in the case of "lands not withdrawn or classified as mineral at the time of entry", Congress was not doing an idle thing but was directing the terms of that Act to forms of withdrawal

(4)See U. S. Geological Survey Bulletin 623, Petroleum Withdrawals and Restorations affecting the Public Domain, Government Printing Office 1916, pp. 182-369, for forms of orders of withdrawal during the period beginning July 1, 1910 and ending January 11, 1916.

orders which were then customary and in accordance with the executive and administrative practice.[5]

POINT THREE.

THE AMENDED BILL OF COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT SHOW THAT THE PETITIONER WAS HIMSELF ENTITLED TO EITHER A PROSPECTING PERMIT OR A LEASE FROM THE UNITED STATES AND THAT IT WAS REFUSED TO HIM BECAUSE OF AN ERRONEOUS RULING OF LAW BY THE SECRETARY OF THE INTERIOR.

There is nothing in the amended bill of complaint to indicate that there was any fiduciary relationship, or any relationship of any kind, between the petitioner and any of the respondents. Nor is there anything in it which charges that any of the respondents deprived the petitioner of his claimed preference right by fraudulent means. It is wholly devoid of anything in the nature of an allegation that the petitioner made application to the Department of the Interior, or the Secretary, for either a prospecting permit or for an

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(5)The history of the development of the form of order of withdrawal embodied in the Order of December 30, 1910, was given by E. C. Finney, former First Assistant Secretary of the Interior, who testified at the trial of this suit. He said: "After the enactment by Congress of the Pickett Act of June 25, 1910, this form of order was drawn up. After the act of Congress was approved it was determined by the Department that a form of withdrawal order should be prepared in a lawyer-like and legal manner, to follow as far as appropriate the language of the statute itself, that is the Pickett Act of June 25, 1910. We considered it advisable to have a general form rather than to have different wording in each order. We cooperated in drawing up a general form in effect and substance like this one which was used very generally in making departmental withdrawals under the Pickett Act. By Departmental withdrawals, I mean Executive withdrawals. The language 'Reserved for classification' was taken from the language of the Pickett Act of June 25, 1910. The words 'Classification of lands' are used in the statute. Also the words 'withdrawn from settlement, sale or entry' are used in the statute. Our effort was to get as nearly a uniform form as possible and go along with the language of the statute and at the same time to state the purpose for which the withdrawals were being made." (R. 180, 181.)

oil and gas lease, and that he was refused either by reason of a mistake of law by the Department or the Secretary. The amended complaint being thus deficient it fails to state a cause of action. This seems to be settled by the cases of

Anicker v. Gunsburg, 246 U. S. 110;

Hodgson v. Federal Oil etc. Co., et al., 5 F. (2d) 442, affirmed in 274 U. S. 15;

Sullivan v. Mammoth Oil Co. (1927—8 C. C. A.), 22 F. (2d) 663, at p. 664,

where it is said:

"Asserting fraud and misrepresentation on the part of the appellees, and rights paramount to theirs, he asks that they be declared trustees for him with respect to the lease granted to them, and that he be invested as the lessee under that instrument with all the rights and obligations incidental thereto.

In order to sustain a claim and to obtain relief of this nature, 'it would be necessary to allege definite facts (not mere conclusions) sufficient to show some fiduciary relationship' between appellant and appellees. *Hodgson v. Fed. Oil & Dev. Co.,* 274 U. S. 15. But the bill in this case shows neither cotenancy nor correlation of any kind. The claims are adverse. Appellees are charged with having wrongfully appropriated the property rights of appellant more in the nature of trespass than of breach of trust.

'In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was

refused to him because of an erroneous ruling of law by the Secretary.' *Anicker v. Gunsburg,* 246 U. S. 110-117, 62 L. Ed. 603; *Hodgson v. Fed. Oil & Dev. Co., et al.* (8 C. C. A.), 5 Fed. (2d) 442-446, affd. 274 U. S. 15, 71 L. Ed. 901; *Devlin v. Central Wyo. Oil & Inv. Co.* (8 C. C. A.), 20 Fed. (2d) 530.

Under the foregoing decisions, appellant is foreclosed from substitution under the lease to appellee Mammoth Oil Co."

Not only is the amended bill of complaint devoid of any allegation to indicate a fiduciary relationship, or any relationship of any kind, between the petitioner and any of the respondents, and of any allegation of fraud by respondents, and of any allegation indicating that the petitioner had a better right to a prospecting permit or a lease on the premises involved in this suit, a right such as in law should have been respected by the officers of the Land Department and, being respected, would have given him the permit or lease, but, more and worse than that, the petitioner's case on the merits is utterly devoid of any evidence on any of these points, except affirmative evidence from the petitioner himself showing that he never applied for an oil and gas prospecting permit and that he never applied for a lease. (R. 106.)

See,

Brown v. Standard Oil Co., 45 Pac. (2d) 639 (Colo.).

If it be assumed that petitioner's theory, that he was entitled to personal notice of the Crum appli-

cation for a permit, is correct, the fact that he did not receive such notice does not help him. He still fails to show that he was entitled to a preference under Section 20 of the Leasing Act.

In *Bohall v. Dilla,* 114 U. S, 47, pp. 50, 51, this court said:

> "To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant."

And in *Lee v. Johnson,* 116 U. S. 48, another case in which it was sought to charge a patentee as trustee of the property, this court said, at page 50:

> "It is not enough, however, that fraud and imposition have been practiced upon the Department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which, otherwise, would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains, he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is

sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

In the circumstances of this case the petitioner cannot show that he was entitled to either a permit or a lease.

POINT FOUR.

THE PETITIONER HAS BEEN GUILTY OF LACHES IN THE ASSERTION OF HIS CLAIM.

Even if there were merit in the substantive claim of petitioner, the long delay in the assertion of it prevents the aid of a court of equity in the enforcement of it.

It is a truth too well established to require discussion, that the doctrine of laches is one which must be applied by a court of equity in accordance with the facts of the particular case before the court when the doctrine is invoked. *Badger v. Badger,* 2 Wall. 87, 92.

Where, as in the instant case, the property is of a highly speculative nature, the mere holding of it entails a very definite risk, and delay in asserting a claim to it will not be tolerated by a court of equity.

The facts material to the issue of laches in the present case are these. Drilling was done on the permit area, in close proximity to petitioner's surface homestead, and the money and enterprise of respondents contributed in very substantial measure to this drilling and to the consequent development of the property. The permit area included not only the lands

covered by petitioner's surface homestead in the North ½ of Section 30, but also the Northwest ¼ and the South ½ of Section 18, the Northwest ¼ of Section 32, and all of Sections 20 and 28, and the South ½ of Section 30, all in Township 21 South, Range 17 East, M. D. M. The above area, included within the single permit, Serial No. 09551, issued to Thomas Crum, was a unit for the purposes of development work, and development or drilling on any section within its limits was just as effective in a consideration of the laches of petitioner as drilling on the North half of Section 30.

It was shown by petitioner's own testimony that he knew that his lands were involved in a permit and that drilling was being done within the area included within that same permit. He testified that a well was drilling on Section 20, Township 21 South, Range 17 East (within the permit area) in 1924 (R. 91), and that he could see that drilling rig easily from the porch of his home at that time. (R. 98.) He testified that in the year 1928, or the spring of 1929, he was present many times at the site of a well then drilling on Section 28, again a well located within the area covered by the permit. (R. 98.) He testified that he saw drilling in 1927 on Sections 29, 28 and 34. (Section 28 is within the area covered by the permit, and Sections 29 and 34 are contiguous to that area.) (R. 99.)

Petitioner further testified that he knew, during 1928, 1929 and 1930, that wells were being drilled in Sections 28, 29, 34 and 26, all in Township 21 South,

Range 17 East, M. D. M. (R. 102.) He knew that the Crum permit covered Section 28, and that it also covered the North half of Section 30, his homestead. Yet, as he admitted on the trial, he did nothing in 1928, nothing in 1929, and nothing in 1930. As early as 1925, according to his own testimony, he had been told that he had a preference right to a permit to prospect for oil and gas. (R. 101.) As early as 1922 or 1923, he, being intimately acquainted with, and frequently (almost constantly) on the area involved, saw the boundary posts erected by the permitee. (R. 100, 101.) In 1928 he *inquired* of one Mr. Bottler, an attorney, concerning the permit covering his land (R. 100), and was told that the Crum permit covered his homestead. This, it must be remembered, was after he had been told that he had a preference right to such a permit; after he knew of his supposed rights. He knew in 1928 and long before, that wells were being drilled in sections on the permit area and close to it.

It is entirely clear that petitioner knew that his lands were involved in a prospecting permit, and that wells were drilling on the area covered by that permit. He knew that money and effort were being expended on those wells within the permit area, of which his homestead was a part. It was shown at the trial that respondents spent hundreds of thousands of dollars in developing this area. (See respondents' Exhibits "O" and "P", R. 222-224, R. 240-244.)[6]

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(6)Money expended within the limits of the Crum permit prior to July 1, 1931, are as follows: On Well 428-J, in Section 28, $27,311.83, by Pacific Western Oil Company, up to March 31, 1931, and $71,863.75, by

Knowing all these facts, petitioner did nothing in 1928, nothing in 1929, nothing in 1930, nothing prior to that time (R. 102), and not until he filed this suit in June of 1931, did he in any way assert any claim. (R. 106.) Furthermore, he testified that until 1931 he did not believe the lands were valuable for oil, that he was not interested in the minerals, and that not until the wells came in did he make up his mind that he wished to claim the preference right. (R. 101, 108.)[7]

We have, then, a claimant who, at the very least, and this is shown beyond question by his own testimony, was in possession of facts which would place any reasonable person upon inquiry concerning the situation which existed with regard to the prospecting permit. The cases show beyond any doubt that it is not necessary to bring home to one against whom the doctrine of laches is sought to be invoked, actual

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Kettleman North Dome Association, from April 1, 1931, to June 30, 1931, a total of $99,175.58 (R. 241-2); on Milham-Kennedy Well No. 1— 828-J, in Section 28, $204,703.13 to March 31, 1931, and $116,189.67 by Kettleman North Dome Association from April 1, 1931, to June 30, 1931 (R. 241-242); on Milham Well No. 25—now 2528-J, in Section 28, $119,002.40 prior to July 1, 1931. (R. 242.) Expenditures by Kettleman Oil Company and Pacific Western Oil Company jointly, represented by assessments paid to Kettleman North Dome Association on account of the area within the permit, exclusive of the portion of the permit area conveyed to Milham Exploration Company to June 30, 1931, were $742,071.91, of which $276,119.78 was paid on account of the North half of Section 30, Township 21 South, Range 17 East. (R. 243.)

(7) "Before 1931 I didn't believe that Section 30 was valuable for oil. It was when wells began coming in that I made up my mind to make claim to this preference." (R. 108, from condensed statement of testimony of Bourdieu.)

"I just stood still after learning that I had a preference right, and didn't do anything. I was not interested in the minerals. If anyone filed a permit I would have been notified. I didn't file an application with the Government for the right to drill for oil, and have not done so, nor for a lease. In July, 1928, when Mr. Bottler told me that the Crum permit to drill covered the North ½ of Section 30, I didn't do anything, and nothing in 1929, or in 1930. During all that time, I knew that wells were being drilled in Sections 29, 28, 34 and 26." (R. 101-2, from condensed statement of testimony of Bourdieu.)

positive knowledge of all the facts which would constitute an invasion of his claimed rights. In *Johnston v. Standard Mining Company,* 148 U. S. 360, the court said, at page 370:

> "While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.
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> * * * * * * *
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> The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. * * *"

And see *Foster v. Mansfield etc. Railway,* 146 U. S. 88, *Wood v. Carpenter,* 101 U. S. 135, 141, and *Grymes v. Sanders,* 93 U. S. 55.

It is clear that the courts will not tolerate a delay by a party to enable him to decide whether or not it will be profitable for him to assert his alleged rights, and this principle, as well as the general principles applicable to the doctrine of laches when it is invoked in a case involving conflicting claims to oil property, is well expressed in the case of *Twin-Lick Oil Company v. Marbury,* 91 U. S. 587. In that case the

property in controversy had been purchased from the corporation which had first owned it by a director of the corporation. In buying the property, the director had committed no actual fraud and the corporators who, with the corporation itself, were complainants in the case, knew at the time of the purchase the facts upon which their right to avoid the sale depended. Four years later, after the property had become extremely valuable, and during which the complainants had in no way contributed to the development of the property (which was oil property), and during which they had assumed none of the risk attendant thereon, the corporators and the corporation filed a bill in equity praying for a decree that the defendant held the property as trustee for the company. This Court held that the doctrine of laches barred any decree in favor of the complainants. In the opinion appears the following language (at p. 592):

> "In fixing this period in any particular case, we are but little aided by the analogies of the statutes of limitation; while, though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. *No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed in a court of equity.*"

At pages 592 and 593 the language employed by the court is so applicable and pertinent to the present case that we feel constrained to quote it here *in extenso:*

> "The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option, are numerous and well collected in the brief of appellee's counsel. The more important are as follows: *Badger v. Badger,* 2 Wall. 87; *Harwood v. R. R. Co.,* 17 id. 78; *Marsh v. Whitman,* 21 id. 178; *Vigers v. Pike,* 8 Cl. & Fin. 650; *Wentworth v. Lloyd,* 32 Beav. 467; *Follansbee v. Kilbreth,* 17 Ill. 522.
>
> The cases of *Bliss v. Edmonson,* 8 DeG, M. & G. 787, *Prendergast v. Turton,* 1. You. & Coll., while asserting the same general doctrine, have an especial bearing on this case, because they relate to mining property.
>
> The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

And at page 516:

> "He cannot stand by and speculate on the chances. He cannot delay, and say, by his acts: 'it is mine, if it be a good thing. You may keep it, if it be a poor thing'."

See also *Hayward v. National Bank,* 96 U. S. 611, at page 618.

According to his own testimony the petitioner herein did not decide that he wished to assert a claim until the oil wells began coming in around his property. (R. 101, 108.) Thus he silently awaited the outcome of a speculative venture and then when it had proved successful and the risk was over, he decided to assert a claim to all the profits.

The cases establish the rule that where, during the interval of delay by the complaining party, changes have occurred in the value of the property or in the relations of the parties, equity will not countenance an injustice by enforcing the asserted claim.[8] The

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[8] Most substantial changes occurred in the Bourdieu property during petitioner's long delay: Milham-Elliot No. 1 well (commonly known as the Kettleman Hills Discovery Well) was completed on November 12, 1928, at a total cost of $326,667.09 (R. 241), and the now famous Kettleman Hills Oil Field became a known quantity in the oil world; Milham-Kennedy Well No. 1, now known as KNDA Well 828-J, was drilled, and an expenditure of $320,892.80 made prior to July 1, 1931 (R. 241); Milham Well No. 25, now known as KNDA Well 2528-J, was drilled at an expense of $119,002.40 prior to July 1, 1931 (R. 242); Well KNDA 428-J was commenced, and an expenditure of $99,175.58 made prior to July 1, 1931. (R. 241-2.)

Changes also occurred in the relations of the parties during petitioner's delay; on January 7, 1927, Kettleman Oil Corporation paid to Frank Kennedy the sum of $36,000.00 for the assignment of the Crum permit (including the Borden lands) (R. 240); on January 7, 1927, Kettleman Oil Corporation entered into an operating and drilling agreement with Milham Exploration Company (see Exhibit "O")—R. 222-22[illegible]; on March 9, 1929, Kettleman Oil Corporation conveyed to Pacific Western Oil Company an undivided one-half interest in these lands and in certain other lands, and Pacific Western Oil Company paid to Kettleman Oil Corporation the sum of $1,000,000.00 (Exhibits "T" and "U"—R. 226); on October 4, 1929, leases were issued by the United States of America to Kettleman Oil Cor-

controversy at bar involves an exceedingly speculative property right, and the principle announced applies, therefore, with especial force.

The opinion in the case of *Galliher v. Cadwell,* 145 U. S. 368 (at pages 371 et seq.) reviews some of the leading cases upon the doctrine of laches as it has been applied by this Court to controversies involving property, which during the interval of delay by the complaining party, has materially changed in value. The case forcibly illustrates the principle that a claimant may not sit supinely by while the property to which he subsequently lays a claim appreciates or depreciates, as the case may be, in value and then assert his alleged claim when changes in the value of the property have made it to his advantage to attempt to enforce his claimed right. After reviewing many cases the opinion states:

> "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition of relations of the property or the parties. * * *"

The respondents in this suit could not be compensated by any decree for the risk which they assumed in developing the property involved. The case of *Patterson v. Hewitt,* 195 U. S. 309, is a leading case upon the

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poration and Pacific Western Oil Company (Exhibits "2-C" and "2-D") as a reward for the discovery of petroleum (R. 230); and on January 31, 1931, Kettleman Oil Corporation and Pacific Western Oil Company became parties to the famous Kettleman North Dome Unit Plan Agreement. (Exhibit "2-I"—R. 232.)

doctrine of laches. In that case the court said, at pages 320 and 321:

> "To award them (appellants) now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

The time necessary to constitute laches and thus bar relief in equity may be very short. In the *Patterson* case, supra, the court said of this (page 319):

> "Indeed in some cases the diligence required is measured by months rather than years. *Pollard v. Clayton,* 1 Kay & Johnson 462; *Atwood v. Small,* 6 Clark & Finelly 232.
>
> And in others a delay of two, three or four years has been held fatal. *Twin-Lick Oil Co. v.*

Marbury, 91 U. S. 587; *Hayward v. National Bank,* 96 U. S. 611; *Holgate v. Eaton,* 116 U. S. 33; *Hagerman v. Bates,* 5 Colorado App. 391; *Graff v. Portland Co.,* 12 Colorado App. 106."

Petitioner's theories do not prevent the application of the doctrine of laches. Petitioner makes the point that the doctrine of laches is not available to the respondents for the reason, as he states it, that he was in "undisturbed possession" of the land involved and was under no duty to act until disturbed in that possession. It is obvious that while that may be a correct principle of law when applied to a suitable case, it cannot apply in this instance. In the present case, the "undisturbed possession" which petitioner refers to is the undisturbed possession of the surface of the land. But that possession is not here material. *The oil and gas rights are all that are here involved.* Petitioner misconceives the nature of the controversy. The property involved is not the surface right, but the right to extract the oil. The real question is whether or not petitioner had notice (or had knowledge of facts which put him upon inquiry) of the possibility of an invasion of his claimed preference right to a permit. The only possible effect of actually entering upon the surface of Section 30 and drilling there would be to make it absolutely certain that petitioner had such notice. But it is already clear from the undisputed facts of the case that ample notice to petitioner that his claimed rights, if any existed, were being invaded was brought home to him long before this suit was filed.

Petitioner asserts (Petitioner's Supplementary Brief, p. 29) that only the receipt of personal notice of application for a prospecting permit could constitute due process of law to divest him of his claimed preference right. Petitioner gives no authority supporting that assertion. We cannot believe that petitioner's counsel means seriously to contend that Bourdieu, with actual knowledge of an invasion of his claimed rights, could sit supinely by and wait for a formal personal service of notice, and still not be affected by his delay, still not be subject to the application of the doctrine of laches.

It is obvious that petitioner is squarely in the position of one who avoids all risks attendant upon the holding or development of a highly speculative property, waits until the turn of events would make it highly profitable to assert a claim, and then and only then comes forward to claim the benefits of an enterprise with which he had no desire to associate himself before it became certainly profitable. He is laying a claim to all the benefits after avoiding all the burdens, all the risks, and all possibility of any loss. The authorities herein noted prove to a point of demonstration that courts of equity do not permit anyone to do this. There is no element lacking to make out a case of gross laches and it is respectfully submitted that petitioner must fail upon the sole ground of his inexcusable delay, if upon no other ground.

CONCLUSION.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed, if not on the ground that the courts have no jurisdiction of the subject matter of this suit, then on the ground that it clearly appears that the United States is an indispensably necessary party to a determination of questions which affect the interests of the United States. It is respectfully submitted, further, that if this court does not affirm the decision of the Circuit Court of Appeals, it should affirm the decision of the District Court.

Dated, San Francisco, California,
October 1, 1936.

HERBERT W. CLARK,
FELIX T. SMITH,
Solicitors for Respondents, Pacific Western Oil Company and Kettleman Oil Corporation, Ltd.

GEORGE W. NILSSON,
Solicitor for Respondent, Kettleman North Dome Association.

HERMAN PHLEGER,
Solicitor for Respondent, Frank Kennedy.

W. J. KENNEY,
Solicitor for Respondent, Franklin R. Kenney.

(Appendix Follows.)

Appendix

THE PICKETT ACT.

ACT OF JUNE 25, 1910, 36 STAT. 847, U. S. C. A. TITLE 43, SECS. 141, 142, 143.

An Act to Authorize the President of the United States to Make Withdrawals of Public Lands in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Sec. 2. (As amended by the act of August 24, 1912, 37 Stat. 497.)—That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: **Provided,** That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the

(Note): As originally adopted on June 25, 1910, the portion of section 2 which appears before the proviso, contained the words "mineral other than coal, oil, gas and phosphates" instead of the words "metalliferous minerals".

diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: **Provided further,** That this Act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: **And provided further,** That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: **And provided further,** That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado or Wyoming, except by Act of Congress.

Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

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Department of the Interior
United States Geological Survey
Washington

Office of the Director

December 28, 1910

The Honorable,
The Secretary of the Interior.

Sir:

Information received from the field indicates that the following lands are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action.

Very respectfully,
H. C. Rizer
Acting Director.

December 29, 1910.
Respectfully referred
to the President with ECF
favorable recommendation.
Frank Pierce,
Acting Secretary.

[Stamped]: Received Jan 3 1911 G. L. O.

[Stamped]: 99352 Received G. L. O. Jan. 3 1911

Reference to..... Assigned to W P W Answered by..... Noted..... Filed.....

[Written]: To R & R Visalia 1/3/11 W P W 'N"
"Div 1-5-11 Posted in N [illegible]

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